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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1461

THELMA B. STANTON,
Appellant,

v.

JAMES LAWRENCE STANTON, JR.,
Appellee.

On Appeal from the Supreme Court
of the State of Utah

BRIEF FOR THE APPELLANT

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Biology and Behavior, ed. David C. Glass, New York, Rockefeller University and Sage Foundation, 1968 26-27

Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv.L.Rev. 17 (1972) 15

Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 Neb.L.Rev. 131 (1968) 25

Kanowitz, *Sex Roles in Law and Society* (1973) p. 175 23

Money, John, "Developmental Differentiation of Femininity and Masculinity Compared," *Potential of Women*, McGraw Hill, 1923, pp. 51-56 26

Stoller, Robert J., *Sex and Gender*, New York, Science House, 1968, pp. viii-ix 26

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OPINION BELOW

The opinion of the Supreme Court of the State of Utah (R. 75-76) is reported at 30 Utah 2d 315, 517 P.2d 1010.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on January 4, 1974 (R. 75-76).

A petition for rehearing was denied on January 30, 1974 (R. 74). Notice of Appeal to the Supreme Court of the United States was filed on March 5, 1974 (R. 101), and docketed on April 1, 1974. Probable jurisdiction was noted on October 21, 1974. The jurisdiction of this court rests upon 28 U.S.C. §1257(2). See also 28 U.S.C. §2101(c) and Rules 11 and 13, Revised Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15-2-1 Utah Code Annotated 1953 (Utah Code Replacement Volume 2A [1973], p. 475):

> The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors attain their majority by marriage.

30-3-5 Utah Code Annotated 1953 (Utah Code Replacement Volume 3 [1969], p. 664):

> *Disposition of property and children.* — When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenence of the parties and children, as may be equitable; provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.

30-3-5 Uah Code Annotated 1953 as amended by Chapter 72, §3, Laws of Utah 1969 (Utah Code Replacement Volume 3, 1973 pocket supplement, p. 265):

> *Disposition of property and children.* — When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

Title 78, Chapter 45, Utah Code Annotated 1953 (Utah Code, Volume 9 [1953], 1973 pocket supplement, p. 93; Chapter 110, §§1-14, Laws of Utah 1957):

> 78-45-1. *Short title.* — This act may be cited as the Uniform Civil Liability For Support Act.
>
> 78-45-2. *Definitions.* — As used in this act:
> (1) "State" includes any state, territory or

possession of the United States, the District of Columbia and the Commonwealth of Puerto Rico.

(2) "Obligor" means any person owing a duty of support.

(3) "Obligee" means any person to whom a duty of support is owed.

(4) "Child" means a son or daughter under the age of twenty-one years, and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

(5) "Parent" includes either a natural parent or an adoptive parent.

78-45-3. *Duty of man.* — Every man shall support his wife and child.

78-45-4. *Duty of woman.* — Every woman shall support her child; and she shall support her husband when he is in need.

78-45-5. *Duty of obligor regardless of presence or residence of obligee.* — An obligor present or resident in this state has the duty of support as defined in this act regardless of the presence or residence of the obligee.

78-45-6. *District Court jurisdiction.* — The district court shall have jurisdiction of all proceedings brought under this act.

78-45-7. *Determination of amount of support.* — When determining the amount due for support, the court shall consider all relevant factors, including but not limited to:

(1) the standard of living and situation of the parties;

(2) the relative wealth and income of the parties;

(3) the ability of the obligor to earn;

(4) the ability of the obligee to earn;

(5) the need of the obligee;

(6) the age of the parties;

(7) the responsibility of the obligor for the support of others.

78-45-8. *Continuing jurisdiction.* — The court shall retain jurisdiction to modify or vacate the order of support where justice requires.

78-45-9. *Enforcement of right to support — Powers of state department of public welfare.* — The obligee may enforce his right of support against the obligor and the state department of public welfare may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the statement department of public welfare furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. Whenever such action is commenced by the state department of public welfare, it shall be the duty of the county attorney, of the county of the residence of the obligee, to represent the state department of public welfare.

78-45-10. *Appeals.* — Appeals may be taken from orders and judgments under this act as in other civil actions.

78-45-11. *Husband and wife privileged communication inapplicable — Competency of spouses.* — Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable under this act. Spouses are competent witnesses to testify to any relevant matter, including marriage and parentage.

78-45-12. *Rights are in addition to those presently existing.* — The rights herein created are

in addition to and not in substitution of any other rights.

78-45-13. *Interpretation and construction.* — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

[Chapter 110, §13, Laws of Utah 1957, is a separability clause which has not been included as a separate code section.]

QUESTIONS PRESENTED FOR REVIEW

The Utah Supreme Court construed 15-2-1 Utah Code Annotated 1953 so as to terminate divorce-decreed support for a daughter at the age of eighteen years, but to continue it for a son until the age of twenty-one years. The questions presented are:

1. Whether 15-2-1 Utah Code Annotated 1953 is invalid because in contravention of the due process and equal protection clauses of the fourteenth amendment.

2. Whether the divorced spouse to whom support money payments were to be made has standing to challenge the constitutionality of the statute.

3. If the statute is held to be invalid, whether support money payments for the daughter continue until she reaches the age of twenty-one years.

STATEMENT

Thelma B. Stanton, plaintiff and appellant, and James Lawrence Stanton, Jr., defendant and appellee, were married on February 22, 1951 (R. 1) and divorced on November 29, 1960 (R. 10). The parties have a daughter and a son, Sherri and Rick (R. 12). The decree of divorce awarded care and custody of the two children to Mrs. Stanton (R. 10) and provided for their support as follows (R. 11):

> Defendant is ordered to pay to plaintiff the sum of $300.00 per month as child support and alimony, $100.00 per month for each child as child support, and $100.00 per month as alimony, to be paid on or before the 1st day of each month through the office of the Salt Lake County Clerk.

Sherri's eighteenth birthday was on February 12, 1971 (R. 24), at which time Mr. Stanton discontinued payments for her support. Rick turned eighteen on January 29, 1973 (R. 24). Mr. Stanton continued his support payments except for a short period when Rick was living in his home (R. 48). On May 22, 1973, Mrs. Stanton moved the District Court of Salt Lake County for entry of judgment against Mr. Stanton in the amount of $3,000.00 representing $2,700.00 accrued support money for her daughter, and $300.00 accrued support money for her son (R. 43-45).

The trial court ruled that the rights of the parties were governed by 15-2-1 Utah Code Annotated 1953, which sets the age of majority at eighteen years for females and twenty-one years for males. In Conclusion of Law No. 1 of the Amended Findings of Fact and Conclusions of Law entered on June 13, 1973 (R. 48), the court said:

> On February 12, 1971, Sherri Lyn Stanton, one of the children of the parties, became eighteen years of age, and under the provisions of 15-2-1 Utah Code Annotated 1953, thereby

attained her majority. Defendant is not obligated to plaintiff for maintenance and support of Sherri Lyn since that date.

On that basis, the court denied Mrs. Stanton's motion for judgment (R. 50-51).

Mrs. Stanton appealed to the Utah Supreme Court, contending that the statute is invalid under the equal protection and due process clauses of Amendment XIV, United States Constitution. The Utah Supreme Court held the statute was properly construed and did not violate the United States Constiution. It affirmed the order insofar as it denied support for Sherri, but reversed insofar as the order denied a judgment for accrued support for Rick. It also held the son's support was to continue "during his minority unless otherwise properly determined and ordered by the District Court" (R. 74-76).

SUMMARY OF ARGUMENT

The Utah "age of majority" statute contains a classification based solely on sex, and affects a fundamental right, i.e., a child's right to be fed, clothed, and sheltered, by her parents. No compelling state interest is involved. The statute cannot withstand any judicial scrutiny, "close" or otherwise. The classification has no substantial relationship to any ascertainable legislative objective.

In Utah, the obligation of a spouse to pay accrued child support under a divorce decree runs in favor of the other spouse. Mrs. Stanton, therefore, has standing to maintain this action and challenge the constitutionality of the statute.

The statute being unconstitutional, Mrs. Stanton is entitled to receive support until her daughter attains the age of twenty-one years. At common law, the age of majority for both males and females was twenty-one years, and if the statute is struck down, the common law applies. In any event, the benefit of the legislation should be extended to improperly excluded female children.

ARGUMENT

I.

The statutory establishment of different ages of majority for males and females, solely on the basis of their sex, is prohibited by the Fourteenth Amendment to the United States Constitution.

The decree of divorce (R. 11) was based upon a stipulation of the parties (R. 9), and neither the stipulation nor the decree specified the ages to which child support would continue. The divorce statute, 30-3-5 Utah Code Annotated 1953, provides for support and maintenance of "children," without reference to age or to minority. The Utah Uniform Liability for Support Act, 78-45-2 Utah Code Annotated 1953, defines "child" as "a son or daughter under the age of twenty-one years."

Nevertheless, the Utah courts held that the duty of a husband to pay child support to his wife terminates for a daughter at the age of eighteen years, and for a son at the age of twenty-one years. The decision was based upon the classification contained in 15-2-1 Utah Code Annotated 1953:

> The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors attain their majority by marriage.

Although legislative bodies are accorded a wide range of discretion in making statutory classifications, such discretion has its limits, and those limits vary with the legislative objectives, the interests involved, and the criteria upon which classifications are based.

The traditional, or "rational basis", test was articulated by the court in ***F. S. Royster Guano Company v. Virginia***, 253 U.S. 412, 415 (1920):

> It is unnecessary to say that the "equal protection of law" required by the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court established that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

The "rational basis" test occasionally has been applied in such a manner that a successful attack on statutory classifications was virtually impossible. In *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961) it was held that a statutory discrimination would not be set aside "if any stated facts reasonably may be conceived to justify it." And see *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assofiation, Inc.*, 360 U.S. 334 (1959); *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947). The "rational basis" test as then applied was too permissive, and additional

restraint was necessary to afford mandated equal protection. Legislation was subjected to strict judicial scrutiny in those instances in which the classifications were based upon "suspect" criteria. In *Loving v. Virginia*, 388 U.S. 1, 11 (1967) and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), race was found to be a suspect criterion. Other suspect criteria have included alienage, *Graham v. Richardson*, 403 U.S. 365, 372 (1971), national origin, *Korematsu v. United States*, 323 U.S. 214, 216 (1944), perhaps wealth, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

Legislation has also been subject to close judicial scrutiny in those cases in which fundamental interests are involved. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), *Griffin v. Illinois*, 351 U.S. 12 (1956), *Shapiro v. Thompson*, 394 U.S. 618 (1969), if such fundamental rights are "explicitly or implicitly guaranteed by the constitution," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

The first attacks on legislative sex classifications met with little success. In *Muller v. Oregon*, 208 U.S. 412 (1908), the court upheld an Oregon law limiting females to a 10-hour working day; in *Breedlove v. Suttles*, 302 U.S. 277 (1937), the court upheld a poll tax statute which treated men and women differently, and in *Goesaert v. Cleary*, 335 U.S. 464 (1948), the court upheld a statute forbidding women to tend bar unless they were the wives or daughters of male owners.

In *Reed v. Reed*, 404 U.S. 71 (1971) the court for the first time invalidated a legislative classification

based on sex. The case involved the Idaho Probate Code, which set out the order in which persons are entitled to administer estates and provided that in cases of persons equally entitled, "males must be preferred to females, and relatives of the whole to those of the half blood." The statute was held to violate the equal protection clause despite the fact that the Idaho Supreme Court had seen the objective of the statute as elimination of one area of controversy to be resolved by the probate court; had viewed the classification as reasonable because of a legislative determination that men were better qualified to act as administrators; and had concluded that the choice of males over females was "neither an illogical or arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits * * * of the two or more petitioning relatives * * *." *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635, 638-639 (1970).

This court held that because the Idaho statute provided for different treatment of applicants on the basis of their sex, it established a classification "subject to scrutiny under the Equal Protection Clause" (404 U.S. at 75). The court considered the classifications in relation to the legislative objectives and reversed the Idaho Supreme Court, saying (404 U.S. at 76-77):

> Clearly the objective of reducing the work load on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether §15-314 advances that objective in a manner consistent with the command of the equal protection clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, it to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the 14th amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not be lawfully mandated solely on the basis of sex.

Although the court quoted the traditional test of *Royster Guano Company*, the approach was far different from those cases holding that a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it, or if the distinction underlying the classification is reasonably debatable. The Idaho statute may not have been subjected to "close judicial scrutiny", but it was certainly subjected to "scrutiny", and the burden of justifying the classification was placed on the state.

Frontiero v. Richardson, 411 U.S. 677 (1973), involved a federal statute under which a serviceman could claim his wife as a dependent whether or not she was dependent upon him at all, while a servicewoman could not claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support. The sex-based classification was held to be invalid.

Speaking for four members of the court, Mr. Justice Brennan said:

> Although the legislative history of the statute sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three judge district court surmised that congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family — and the wife typically

the "dependent" partner — "it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F. Supp. 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." Ibid.

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subject to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed v. Reed*, 404 U.S. 71 (1971) (411 U.S. at 681-682).

* * *

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with a recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the

actual capabilities of its individual members. (411 U.S. at 686-687).

* * *

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid (411 U.S. at 688).

Although a majority of the court did not concur in this opinion, Mr. Justice Stewart did concur in the judgment on the ground that the statute worked "an invidious discrimination in violation of the constitution." Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, concurred on the ground that the case was governed by *Reed*, in which the court subjected a statute to "scrutiny under the equal protection clause." 404 U.S., at 75.

It has been suggested, with some justification, that the test applied by the court in *Reed* differs from both the traditional test and the strict scrutiny test, and that recent equal protection cases have sought to "blur the distinctions between strict and minimal scrutiny precedents by formulating an overreaching inquiry applicable to 'all' equal protection cases." Gunther, *The Supreme Court* 1971 *Term — Foreword*: *In Search of Evolving Doctrine on a Changing Court*: *A Model for a Newer Equal Protection*, 86 Harv. L. R. 1, 17 (1972). Professor Gunther finds a new test under which legislative classifications would be examined in terms of a statutory purpose having "substantial basis

in actuality, not merely in conjecture" and would define that purpose exclusively by reference to materials physically presented to the court. Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and *Police Department v. Mosley*, 408 U.S. 92 (1972).

Lower federal courts have interpreted the *Reed* decision as establishing a different test for validity of legislative classifications.

In *Wark v. Robbins*, 458 F.2d 1295, 1296 (1 Cir. 1972), the court commented on the varying tests of constitutionality of legislation as follows:

> * * * [W]e have been presented with the wide-ranging choice of standard of review which landmark cases in this fluid area suggest: the conventional, relaxed view customary in reviewing economic regulations, McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1960); the more rigorous review, calling for a justification of a suspect classification through proof of a compelling reason therefor, *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed. 2d 1010 (1967); or something in between. * * *
>
> (Note 4) This intermediate approach is suggested by *Reed v. Reed* * * * On the one hand it is noteworthy that the Court has moved away from its readiness to conceive any reasonable basis for differentiating the sexes as demonstrated in *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 1118 (1961) [upholding a Florida statute relieving women from involuntary jury service], but on the other hand it is equally apparent that the court had ample opportunity to hold sex a "suspect classification" but did not do so. These observations, particularly in a case involving such a substantial interest as that of appellant being subjected to an

> escape penalty free of extraneous sex-based considerations, would argue for a requirement that the state must do more than allow a court to speculate and must in fact demonstrate a substantial relation to a legitimate state objective. * * *"

Grain v. Waterford Board of Education, 473 F.2d 629 (2 Cir. 1973) involved the validity of a requirement that maternity leave of female teachers be taken "not less than four months prior to expected confinement or such earlier time as a replacement becomes available." The court said (473 F.2d, at 633):

> In several cases from its past Term, however, the Court has suggested that rational basis scrutiny is not so deferential a standard of review as had been previously and generally supposed. First, the Court has apparently narrowed the linguistic gap between the two standards; it has avoided the terminology of two-tiered review in some cases, by posing instead certain fundamental inquiries applicable to "all" equal protection claims. * * *
>
> Moreover, the court seems far less willing to speculate as to what unexpressed legitimate state purpose may be rationally furthered by a challenged statutory classification. [Citations omitted.]
>
> Finally, and perhaps most significantly, the court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous. While under McGowan v. Maryland, *supra*. [366 U.S. 425, 426], a classification is to be sustained unless it is "wholly irrelevant" to some permissible purpose, cases from the past Term spoke differently.

After an extensive analysis of the provisions of the regulation, and of the justifications advanced for it, the court held the classification to be invalid.

See also *Heath v. Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972) and *Eslinger v. Thomas*, 476 F.2d 225, 231 (4 Cir. 1973).

Whatever the standard of review, its application depends upon some analysis of the Utah statutes relating to children, their rights, and their disabilities.

Under the Utah statute, persons are classified as adults or minors by their ages, but the ages are different for the two sexes. Eighteen year old females are adults, but eighteen to twenty-one year old males are minors.

In determining whether the classification is reasonable, not arbitrary, and resting upon a ground of difference having a fair and substantial relation to the objective of the legislation, a starting point is ascertainment of the objective of the legislation. As in many cases, unfortunately, the objective of this legislation must be hypothesized. Utah did not publish legislative committee reports or debates, and the house and senate journals offer no enlightenment. Relevant legislative history is not available.

The forerunner of 15-2-1 Utah Code Annotated 1953 appeared as §1035, Compiled Laws of Utah, 1876, prior to statehood. The statute was substantially similar.

At the time of enactment of the original statute (on February 6, 1852, according to a note in C.L.U. 1876) there were many correlative rights and duties between parent and child which depended upon whether

the child was an infant or an adult. At common law parents had rights to custody and control of their minor children, and duties of protection, support, and care. They could choose what education and religious training the children were to have, could enforce discipline, and were entitled to the earnings and services of the children.

It may be presumed that in 1852 the territorial legislature was attempting to fix an age at which persons would be admitted to full citizenship and permitted to participate generally in the affairs of the society. The statute was enacted only seven years after the first settlers had arrived. Utah was a polygamous, frontier society, and there may then have seemed good reasons for establishing a different age of majority for males and females, e.g., to encourage the early marriage of female children.

Today Utah has many statutes fixing the ages at which children can perform acts, are subject to disabilities, and can participate in the government.

The right of citizens of Utah to vote and hold office may not be denied or abridged on account of sex, and "both male and female citizens, shall enjoy equally all civil, political and religious rights and privileges." [1] Long prior to the Twenty-sixth Amendment all citizens over the age of twenty-one had a right to vote.[2]

Persons of both sexes over the age of twenty-one are competent to act as jurors.[3] At the age of twenty-

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1 Utah Constitution, Article IV, §1
2 Utah Constitution, Article IV, §2
3 78-46-8 Utah Code Annotated 1953.

one years persons of either sex may be admitted to the practice of law.[4] The age at which persons may serve as legislative, executive, and judicial officers is the same for males and females.[5] Persons of the age of twenty-one years or more may incorporate businesses.[6] Tobacco may not be sold, purchased, or possessed by persons of either sex under the age of nineteen years.[7] Licenses for the operation of motor vehicles are issued to persons of either sex at the same ages under the same circumstances.[8] Adult education programs are open to every person eighteen years of age or over.[9] The Uniform Gift To Minors Act defines a minor as a person "who has not attained the age of twenty-one years."[10] Children under eighteen years of age are subject to the jurisdiction of juvenile courts. [11] Persons may dispose of their property by will if over the age of eighteen years.[12] Parents must support their sons and daughters under the age of twenty-one years.[13] And public assistance is provided for "children under the age of 21".[14]

The "age of majority" statute does have legal effect on a number of rights. Minors may disaffirm

4 78-51-10 Utah Code Annotated 1953.

5 Utah Constitution, Article VI, §5, Article VII, §3, and Article VIII, §2; 10-6-6 Utah Code Annotated 1953; 17-5-2 Utah Code Annotated 1953.

6 16-10-48 Utah Code Annotated 1953.

7 76-42-4 and 76-42-5 Utah Code Annotated 1953.

8 41-2-10 Utah Code Annotated 1953.

9 53-30-5 Utah Code Annotated 1953.

10 75-15-2(11) Utah Code Annotated 1953.

11 55-10-64 and 55-10-77 Utah Code Annotated 1953.

12 74-1-1 Utah Code Annotated 1953.

13 78-45-2 to 78-45-4 Utah Code Annotated 1953, printed in brief at pp. 3-4, supra.

14 55-15a-17 Utah Code Annotated 1953.

their contracts.[15] Minors involved in court proceedings must appear either by a general guardian or guardian ad litem.[16] Parents have a right of action for injury to, or wrongful death of, minors.[17] The statute of limitations is tolled during the period of minority.[18] Minors may not act as executors[19] or as administrators.[20] Minors may not purchase alcoholic beverages.[21] And parties in divorce proceedings are required to make payments for the support of their children only during the childrens' minority.[22]

If it ever had, the age of majority statute no longer has as its purpose the establishment of adulthood with all its rights, privileges, and duties. It is a convenient means by which invidious sex discriminations can be incorporated into other statutes by reference.

The Utah Supreme Court in this case viewed the purpose of the statute as "formulating the policy of the law as to when the duty to support children should terminate." (Jurisdictional statement, Appendix C, p. 9a). But the legislature has enacted a general policy that parents have a duty to support their children until the children reach the age of twenty-one years, and beyond that if they are incapable of supporting themselves. See Utah Uniform Civil Liability For

15 15-2-2 Utah Code Annotated 1953.

16 Rule 17(b), Utah Rules of Civil Procedure.

17 78-11-6 Utah Code Annotated 1953.

18 78-2-36 Utah Code Annotated 1953.

18 78-12-36 Utah Code Annotated 1953.

20 75-5-4 Utah Code Annotated 1953.

21 32-7-15 Utah Code Annotated 1953, as amended by Chapter 83, §25. Laws of Utah 1969. Before the 1969 amendment, the age was fixed at twenty-one.

22 Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974).

Support Act, set out in full, *supra,* at pages 3 through 6. It is a general state policy to provide public assistance to needy persons under the age of twenty-one years,[23] and when it does, to require the parents to reimburse it for such aid.[24]

The statute does *not* establish a policy as to when the duties to support children should terminate. It establishes a policy that relates only to divorce proceedings and to when a parent in those proceedings may enforce a child support obligation in favor of a daughter. In *Reed*, the Idaho Supreme Court had sought to justify sex discrimination on the ground that it would prevent intrafamily squabbles. The Utah statute would promote them. When custody of children is awarded to a mother, the children become part of her household. She has a duty to feed, clothe, shelter, and educate them. The relationships and duties continue after the daughter turns eighteen, and a mother without independent means is faced with a serious problem. She can turn the daughter out, make her seek employment, or ask her to sue her father.[25] This is not likely to enhance parent-daughter relationships. It is difficult to conceive any fair and substantial relationship between the legislative classification and any legislative objective. The classification seems to *be* the objective.

The Utah Supreme Court found the classification a reasonable one, apparently on the basis of "old notions" that "continue to prevail": that it is "the man's primary responsibility to provide a home and its essen-

23 55-15a-17 Utah Code Annotated 1953.

24 78-45-9 Utah Code Annotated 1953.

25 Under the Uniform Civil Liability for Support Act, the child is the "obligee". Only the obligee and the state department of welfare may enforce the parent's obligation to support.

tials for the family and that it is a 'salutary thing for him to get a good education and/or training before he undertakes those responsibilities,' " and that "girls tend generally to mature physically, emotionally and mentally before boys, and that they generally tend to marry earlier." It may be a salutary thing for a man to have an education, but it is just as salutary for a woman to have one. If maturity is a legitimate test, the statute is overbroad in inclusion of all men and all women in separate classes. For purposes of voting, driving automobiles, making wills, receiving gifts, buying tobacco, holding public office, incorporating businesses, practicing law, or acting as jurors, one is as mature as the other. But females are more mature than males when it comes to contracting, bringing suit, administering estates, and receiving support.

The Utah statute on the age of majority is an anachronism. As of early 1972 only seven states fixed the age of majority for females at eighteen years and males at twenty-one years: Arkansas, Idaho, Nevada, North Dakota, Oklahoma, South Dakota, and Utah. See Kanowitz, *Sex Roles in Law and Society* (1973), p. 175. Since that time the statutes have been amended to equalize the age of majority in Idaho,[26] Nevada,[27] North Dakota,[28] Oklahoma,[29] and South Dakota.[30] Utah and Arkansas are now the only states with differing ages of majority for males and females.[31]

26 Idaho Code Annotated (1963), §32-101.

27 Nevada Revised Statutes (1963), §129-010.

28 North Dakota Cnt. Code (1960), §14-10-01.

29 Oklahoma Statutes Ann., Title 15, §13.

30 South Dakota Comp. Laws Ann., §26-1-1.

31 15-2-1 Utah Code Annotated 1953 and Arkansas Statutes Annotated, §57-103.

Other courts have invalidated age-sex classifications. In *Harrigfeld v. District Court*, 95 Idaho 540, 511 P.2d 822 (1973), the Idaho Supreme Court considered the constitutionality of a statute fixing the ages of majority for females at eighteen and for males at twenty-one, like the one being challenged here. The case involved the right to bring an action or wrongful death, the defendant contending that the wife and child of a deceased minor could not sue because actions for the wrongful deaths of minors had to be brought by a parent or guardian. The court said (511 P.2d at 825, 826):

> We agree with the plaintiffs that the former Idaho minority statute, which provided different ages of majority for men and women, constituted a violation of the equal protection clause of the 14th amendment.
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> • • •
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> One of the areas which has been subjected to increasing legislative and judicial scrutiny has been that of age-sex discrimination. Statutes which treat persons of the same age differently, solely on the basis of sex, have been found to violate the equal protection clause of the Constitution. • • •
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> • • •
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> Petitioner suggests that Idaho's former minority statute was based on a legislative determination that females of eighteen possessed as much "discretion" as males of twenty-one and therefore were fitted to attain majority at an earlier age. A minority law providing that the age of majority for males was twenty-one and for females, eighteen, was first enacted by the Legislative Assembly of the Territory of Idaho in 1864. S.L. 1864, pp. 515-16. The same sex-

> age differential in regard to the age of majority persisted unchanged in Idaho's laws until 1972.
>
> "[T]he mores and practices of a society that has traditionally encouraged males and discouraged females from [active participation in business and public affairs] cannot be ignored. Against that social background, a legislative determination that females achieve 'discretion' earlier than males • • • is not merely a matter about which reasonable people may differ, but stands out as an arbitrary and unreasonable classification prohibited by the equal protection clause of the United States Constitution." Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Law, 48 Neb.L.Rev. 131, 159 (1968).

In *Lamb v. Brown*, 456 F.2d 18 (10 Cir. 1972) Danny Ray Lamb had been tried as an adult, and had been convicted in the Oklahoma State courts for burglary of an automobile — a felony. He brought a habeas corpus proceeding contending that the Oklahoma statute under which he was tried was unconstitutional because it permitted the benefit of juvenile court proceedings for females under the age of eighteen years, while limiting those same benefits to males under the age of sixteen years. In *Lamb v. State*, 475 P.2d 829 (Okl. 1970) the Oklahoma Supreme Court had upheld the statute stating that it exemplified the legislative judgment of the Oklahoma State Legislature, "premised upon the demonstrated facts of life." Although the United States Court of Appeals for the Tenth Circuit was "strongly disinclined" to hold the considered judgment of the Oklahoma legislature invalid under the federal constitutional standards, it was compelled to do so. The court said (456 F.2d at 20):

Lamb v. State, *supra*, is not helpful in our search for a rational justification for the disparity and treatment between 16-18 year old males and 16-18 year old females under the statute. "Demonstrated facts of life" could mean many things. The "demonstrated facts" which the court relied upon are not spelled out. They are not obvious or apparent. We therefore cannot weigh them to determine if they "might suffice to characterize the classification as reasonable rather than arbitrary and invidious". McLaughlin v. Florida, *supra*, 379 U.S. at 191, 85 Supreme Court at 288.

We have not been presented with a logical constitutional justification for the discrimination inherent in 10 Okl.St.Ann. §1101(a). The state in its brief and oral argument has simply relied upon the unexplained "demonstrated facts of life". Because the purpose of the disparity in the age classification between 16-18 year old males and 16-18 year old females has not been demonstrated, we hold that 10 Okla.St.Ann. §1101(a) is violative of the equal protection clause. * * *

See also *In the matter of Patricia A.*, 31 N.Y. 2d 83, 335 N.Y.S. 2d 33 (1972) in which a similar statute was successfully challenged by a seventeen year old female.

Recent studies make it clear that the old notions about differences between the sexes are only notions. Research shows that most of the personality traits usually associated with a particular sex are culturally, not biologically, determined. See John Money, "Developmental Differentiation of Femininity and Masculinity Compared," in *Potential of Women*, McGraw Hill, 1923, pp. 51-65; Robert J. Stoller, *Sex and Gender*, New York, Science House, 1968, pp. viii-ix; *Biology*

and Behavior, ed. David C. Glass, New York, Rockefeller University and the Russell Sage Foundation, 1968.

Sex discrimination in the Utah statute cannot be justified by genetic differences. The old notions should be overcome by a holding that sex is a suspect criterion for purposes of legislative classifications.

Moreover, the interests involved here are ones that could not be completely takes away by any legislature. The relationships between parent and child have been so much a part of the culture for so long a time that they must be held to be implicitly guaranteed by the due process clause, not by the equal protection clause alone, and are therefore fundamental interests as defined in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

In any event, the genetic studies go further than supporting the view that sex classifications are subpect, they also show that the Utah classification is unreasonable, arbitrary and invidious, and that it bears no fair and substantial relation to the object of the legislation.

The statistics relied upon by the court to uphold a sex-based classification in *Kahn v. Shevin*, 40 L.Ed 2d 189 (U.S. 1974), would require that the classification in Utah's statute be struck down. A longer period of support and education might well reduce the disparity in employment opportunities and earnings between men and women.

II

Appellant has standing to raise the constitutional issue.

Although Mrs. Stanton is not a member of either class described in the challenged legislation, i.e., males and females between the ages of eighteen and twenty-one, her rights are directly affected by the classification.

In Utah divorce proceedings the only parties are the two spouses. Awards are made for the support and maintenance of the children, but the awards run to one spouse or the other. The decree in this case ordered the defendant "to pay to the plaintiff" $100 per month for each child as child support (R. 11).

Mrs. Stanton is more than a stakeholder. In *Anderson v. Anderson*, 110 Utah 300, 172 P.2d 132, 135 (1946), the Utah Supreme Court said:

> Alimony relates to the support of the divorced wife, and support money relates to compensation to a spouse for the support of minor children.

In the ordinary case, the right to past-due support money is the spouse's right, not the child's. In *Larsen v. Larsen*, 5 Utah 2d 224, 300 P.2d 596, 598 (1956), an action for past-due support, the Utah Supreme Court said:

> If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of said past due support money, she should be free to release, compromise, or waive that which is hers.

There was no issue in this case as to whether Mrs. Stanton had supported Sherri during the period in

question. Her answers to interrogatories show that she had (R. 55).

Mrs. Stanton thus has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S., 186, 204 (1962). See also, *Flast v. Cohen*, 392 U.S. 83, 99 (1968); and *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).

III

A daughter's right to support continues until she attains the age of twenty-one years.

As in many cases of legislative classification, this question arises: If the statute is invalidated, is the one class to be given the benefits previously granted to the other, or are the benefits to be denied to both classes?

If the Utah statute is invalidated, there will be no legislation fixing the age of majority, in which case the court should apply the common law rule.

> The common law of England so far as it is not repugnant to, or in conflict with, the Constiution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. (68-3-1 Utah Code Annotated 1953)

At common law, the age of majority was twenty-one years for both males and females. See, Annota-

tion, "Age at which female attains majority," 95 A.L.R. 355; and *Jones v. Jones*, 72 F.2d 829, 830 (D.C. Cir. 1934).

In any event, a holding that a statutory classification is unconstitutional does not require a denial of benefits to both classes. The benefit of the statute should be extended to the excluded class. See *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466, 470 (10 Cir. 1972).

Extending the benefits to daughters would not offend Utah legislative policy, or be repugnant to the constitution or laws of Utah. The general Utah policy, except for divorce proceedings, is for parents to support their sons and daughters until they reach the age of twenty-one years. Utah Uniform Civil Liability for Support Act, Title 78, Chapter 45, Utah Code Annotated 1953.

CONCLUSION

The Utah age of majority statute invidiously discriminates between males and females. There is no fair and substantial relationship between the objective (or objectives) of the legislation and the sex-based classifications contained in it. A number of rights and relationships are affected by the statute, in various ways and under various circumstances. The total statutory scheme with respect to the age-sex classifications is unreasonable, arbitrary, and illogical.

As applied to divorce proceedings, the statute operates to deprive one spouse of the right to support for

an eighteen year old daughter, while giving another, similarly situated, the right to support for an eighteen to twenty-one year old son.

The statute is unconstitutional under the equal protection and due process clauses of the fourteenth amendment.

The judgment of the Supreme Court of the State of Utah should be reversed and the case remanded for entry of judgment in favor of Mrs. Stanton for $2,700 past due support money, and for a determination of the amount of costs and attorneys fees, if any, to be awarded to her for bringing and pursuing this action.

Respectfully submitted,

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